85-1241

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1986

LUBBOCK COUNTY, TEXAS, et al, *Petitioner*

vs.

PAULETTE STEWART, *Respondent*

LUBBOCK COUNTY, TEXAS, et al, *Petitioner*

vs.

BARBARA WILKERSON, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BARBARA WILKERSON, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COME Lubbock County, Texas, et al, Petitioner, and submit their Petition for Writ of Certiorari and would respectfully show the following:

QUESTIONS PRESENTED FOR REVIEW

1.

The Court of Appeals erred in upholding the permanent injunction against implementation of the strip search policy in the Lubbock County jail. Such policy is valid under the decisions of this Court including *Bell v. Wolfish*, 441 U.S. 520, 60 L.Ed.2d 447 (1979) and as a matter of law any personal privacy interest of the arrestees does not outweigh the danger to other inmates and jail personnel resulting from possible hidden weapons and contraband if such search policy is not implemented under the undisputed evidence of the physical facilities existing in the Lubbock County jail which requires all arrestees (regardless of the nature of the offense) to be detained together in the same small area prior to booking.

2.

The Court of Appeals erred in affirming the permanent injunction against the Lubbock County jail strip search policy by the District Court because the District Court had no jurisdiction to grant such injunctive relief since Plaintiffs failed to allege or prove standing to obtain such injunctive relief under the decision of this Court in *City of Los Angeles v. Lyons*, 461 U.S. 95, 75 L.Ed.2d 675, 103 S.Ct. 1660 (1983).

3.

The Court of Appeals erred in holding that Petitioner did not appeal the entire judgment of the District Court in both the Stewart and Wilkerson cases, including the permanent injunction issued by the District Court.

4.

The Court of Appeals erred in holding that the District Court did not abuse its discretion in refusing to set aside the default judgment for attorney's fees in the Stewart case under, inter alia, the decision of this Court in *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983) holding that hours spent on the unsuccessful claim should be excluded in setting the amount of attorney's fees.

LIST OF NAMES OF ALL PARTIES

The following parties have an interest in the outcome of this case:

Petitioners:

Lubbock County, Texas
Lubbock County Sheriff Delwin Lee (Sonny) Keesee
Lubbock County Deputy Sheriff Gerald Reese
Lubbock County Deputy Sheriff Vickie Cooper
Lubbock County Deputy Sheriff Betty Baxter
Lubbock County Deputy Sheriff Lanny Rice
Lubbock County Deputy Sheriff J. Lock
Lubbock County Deputy Sheriff Tammy Guyton
Lubbock County Deputy Sheriff James Gross
Lubbock County Sergeant Paula Clements

Respondents:

Paulette Stewart
Barbara Wilkerson

TABLE OF CONTENTS

Page

Questions Presented for Review ii

List of Names of all Parties iv

Table of Contents v

Table of Authorities vii

Reference to Official Reports of Opinion of Courts Below 1

Statement of Grounds of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Argument 5

(1) Error of courts below in enjoining enforcement of Lubbock County jail search policy 5

(2) Permanent injunction erroneous because Respondents failed to allege or prove standing to obtain such injunctive relief 9

(3) Abuse of discretion by the District Court in refusing to set aside default judgment for attorney's fees 11

Conclusion 13

Signature of Counsel 14

Certificate of Service 15

TABLE OF CONTENTS (Continued)

Page

Appendix A-1

(1) Opinion of the United States Court of Appeals for the Fifth Circuit dated August 5, 1985 ..... A-1

(2) Wilkerson Judgment dated March 13, 1984 and Amended Judgment dated March 14, 1984 ..... A-19

(3) Stewart Judgment and Memorandum dated February 8, 1984 ..... A-22

(4) Order in Stewart case (re attorney's fees) dated April 4, 1984 ..... A-27

(5) Statutes:

42 U.S.C. Sec. 1983 ..... A-29

42 U.S.C. Sec. 1988 ..... A-30

TABLE OF AUTHORITIES

Cases Page

Abel v. United States, 362 U.S. 217, 4 L.Ed.2d 668, 80 S.Ct. 683 (1960) 6
Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983) 9

Bell v. Wolfish, 441 U.S. 520, 60 L.Ed.2d 447 (1979) ..... ii, 6
Brown v. Edwards, 721 F.2d 1442 (2) (5th Cir. 1984) 10

City of Los Angeles v. Lyons, 461 U.S. 95, 75 L.Ed.2d 675, 103 S.Ct. 1660 (1983) ..... ii, 10

Greater Baton Rouge G. Ass'n. v. Recreation & Pk. Commission, 507 F.2d 227 (1) (5th Cir. 1975) 11

Hensley v. Eckerhart, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983) ..... iii, 12

Keegel v. Key West & Caribbean Trading Co., Inc., 627 F.2d 372 (D.C. Cir. 1980) 11

Thorne v. Jones, 765 F.2d 1270 (1) (5th Cir. 1985) 9

United States v. DeLeo, 422 F.2d 487 (1st Cir. 1970) cert. denied 397 U.S. 1037 8
United States v. Edwards, 415 U.S. 800, 39 L.Ed.2d 771, S.Ct. 1234 (1974) 6
United States v. Klein, 522 F.2d 296 (4) (1st Cit. 1975) 8
United States v. Pino, 729 F.2d 1357 (2) (11th Cir. 1984) 6
United States v. Robinson, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973) 5
United States v. Ruigomez, 702 F.2d 61 (5th Cir. 1983) 7
United States v. Sandler, 644 F.2d 1163 (5th Cir. 1981) 6

Federal Statutes

F.R.C.P., Rule 60(b) 11

28 U.S.C. Sec. 1254(1) 2

42 U.S.C. Sec. 1983 2

42 U.S.C. Sec. 1988 ..... 2, 12

REFERENCE TO OFFICIAL REPORTS OF OPINION OF COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 767 F.2d 153 (5th Cir. 1985). A copy of the Court's opinion is contained in the Appendix to this Petition.

Also included in the Appendix herein are copies of the following judgments, memorandums and orders of the District Court.

(1) Wilkerson Judgment dated March 13, 1984 and Amended Judgment dated March 14, 1984

(2) Stewart Judgment and Memorandum dated February 8, 1984

(3) Order in Stewart case (re attorney's fees) dated April 4, 1984.

STATEMENT OF GROUNDS OF JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for the Fifth Circuit dated August 5, 1985 affirming the judgments of the United States District Court in two cases consolidated on appeal, both of which involve the validity of the Lubbock County jail strip search policy.

Lubbock County, Texas, et al, Petitioners, filed a Petition for Rehearing in the United States Court of Appeals for the Fifth Circuit which was overruled by such court on December 17, 1985.

Jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit by Writ of

Certiorari is conferred upon this Court by the provisions of *28 U.S.C. Sec. 1254(1).*

The Federal District Court had jurisdiction of this case under *42 U.S.C. Sec. 1983.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions in issue in this case are the Fourth Amendment to the Constitution and *42 U.S.C. Sec. 1983 and 1988.*

The applicable portion of the Fourth Amendment states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The applicable portions of *42 U.S.C. Sec. 1983 and 1988* are set out verbatim in the Appendix.

STATEMENT OF THE CASE

The Federal District Court had jurisdiction of this case under *42 U.S.C. Sec. 1983*, the Civil Rights Act.

This appeal involves a consolidation of two cases (one by Paulette Stewart and one by Barbara Wilkerson) against Lubbock County, Texas; Lubbock County Sheriff Keesee and other deputy sheriffs in the Lubbock County Sheriff's Office.

Both Plaintiffs sought recovery of damages and a judgment enjoining enforcement of the Lubbock County Sheriff's Office strip search policy.

The District Court entered judgment permanently enjoining enforcement of the strip search policy.

In the Stewart case the jury found no damages and the Court awarded $1.00 nominal damages.

In the Wilkerson case the Court rendered judgment in favor of Plaintiff for damages of $15,000 on the jury verdict for $15,000.

Subsequently, in the Stewart case the Court by Order rendered default judgment in favor of Plaintiff for $17,027.50 attorney's fees, which the District Court refused to set aside on motion of Defendant.

The following parenthetical references herein are page number references to the Transcript of the case cited.

It is important to note at the outset that the search policy sub judice does not permit (and, in fact, specifically prohibits) body cavity searches and involves only visual inspection of the arrestees (Stewart, p. 84).

The search policy specifically provides:

> "No probing of body cavities by jail personnel. This will be done by certified physicians or hospital."

It is undisputed that the physical facilities of the Lubbock County jail require all inmates (regardless of the nature of the charge upon which they were arrested) to be detained together in a small room approximately 8 feet by 14 feet prior to booking.

Approximately 1,000 persons a month are booked into the jail from this area (Stewart, p. 85; Wilkerson, p. 117).

It is undisputed that male prisoners are searched by male deputies and female prisoners by female deputies (Wilkerson, p. 118).

Sheriff Keesee testified that there are too many people processed in and out of the area and too much danger involved to book the prisoners prior to conducting the search (Stewart, p. 97).

The Sheriff also testified that they did not distinguish cases in which searches would be conducted based upon the offense with which the individual was charged because every arrestee, regardless of the nature of the offense, is a potential carrier of drugs and contraband, and even persons arrested on a misdemeanor charge might have previously been charged with or have been convicted of a felony offense. Also as noted above all arrestees regardless of the nature of the charge are confined together in the same room prior to booking and any contraband or weapons could be transferred from one person to another (Stewart, p. 89; Wilkerson, p. 133, 136, 137).

Sheriff Keesee testified that "Approximately a thousand inmates a month are booked through an area no larger than from myself to those two ladies here and they are coming in from every charge from jaywalking to capital murder. But they mingle together, and it is hard for us to try to pick and choose. And to say it is not a secured area in general population would have been a breach of my security." (Wilkerson, p. 117).

There was also testimony by the Sheriff and deputies of instances in which handguns, knives and other weapons have been detected in the strip search which had not been previously detected in a pat down search which is conducted incident to the arrest. (Stewart, p. 98, 202-203; Wilkerson, p. 122, 176).

Plaintiff Wilkerson admitted that there was no physical contact involved in the search and she had no complaints concerning the manner in which the search was conducted. She also testified that she understood the need for jail security. (Wilkerson, p. 75, 95).

ARGUMENT

(1) Error of courts below in enjoining enforcement of Lubbock County jail search policy.

A reversal of the judgment of the Court below is mandated by three of the leading decisions of this Court as well as circuit court decisions cited below.

In *United States v. Robinson*, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973) this Court held that a custodial arrest based upon probable cause is a reasonable intrusion under the Fourteenth Amendment and that such intrusion being lawful, a search incident to such arrest requires no additional justification.

This Court there said:

> "We hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that amendment." 38 L.Ed.2d at p. 441.

In *United States v. Edwards*, 415 U.S. 800, 39 L.Ed.2d 771, 94 S.Ct. 1234 (1974) this Court reaffirmed its holding in *Robinson* and further amplified that holding as follows:

> "It is also plain that searches and seizures that could be made on the spot at the time of the arrest may legally be conducted later when the accused arrives at the place of detention." 39 L.Ed.2d at p. 775, also citing *Abel v. United States*, 362 U.S. 217, 4 L.Ed.2d 668, 80 S.Ct. 683 (1960).

In *Bell v. Wolfish*, 441 U.S. 520, 60 L.Ed.2d 447, 99 S.Ct. 861 (1979) this Court upheld strip search and visual cavity searches after contact between the prisoner at a correctional center and someone from outside the institution in order to deter smuggling of weapons, drugs and other contraband into the institution.

The court held that the issue involved balancing of personal rights against the need for the search and that "the courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted."

As noted above, the strip search policy in the case at bar does not authorize or permit body cavity searches and involves only a visual strip search. It is clear that such search requires a lesser degree of suspicion and justification than the body cavity search. *United States v. Pino*, 729 F.2d 1357 (2) (11th Cir. 1984) citing *United States v. Sandler*, 644 F.2d 1163 (5th Cir. 1981).

Such distinction and the justification for visual searches to insure safety of jail personnel and inmates

resulting from possible secreting of weapons and other contraband was summarized by the Fifth Circuit itself in *United States v. Ruigomez*, 702 F.2d 61 (5th Cir. 1983). The court there said (p. 66):

> "Similarly, the strip search at the station was justified. As was stated in United States v. Edwards, 415 U.S. 800, 703, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974), '[T]he person and the property in his immediate possession may be searched at the station house after the arrest has occurred at another place. . . .' In Edwards, the Court held that, with or without probable cause, the authorities were entitled at the point before the administrative processes incident to the arrest and custody had been completed not only to search Edwards' clothing, but also to take it from him and to keep it in official custody. 415 U.S. at 804, 94 S.Ct. at 1237-38. In United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973), the Court stated:
>
> > "*A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the fourth amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.* It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the fourth amendment, but is also a 'reasonable search' under that amendment.
>
> "A full search of the person incident to lawful arrest is reasonable and permissible under the fourth amendment and is excepted from its warrant requirement. United States v. Sheikh, 654 F.2d 1057, 1072 (5th Cir. 1981); United States v. McFarland, 633 F.2d 427, 429 (5th Cir. 1980).

> "While we have held recently that 'the fourth amendment applies with its fullest vigor against any intrusion on the human body,' Horton v. Goose Creek Independent School District, 690 F.2d 470, 478 (5th Cir. 1982), *there was no physical intrusion involved in the instant case. Rather, the police were, at a minimum, justifiably ensuring that the defendant had no weapons or other contraband secreted on his person which he would be able to transport into the jail cell. The safety of the custodians and the inmates required no less than this.*" (emphasis ours).

Sheriff Keesee testified that such searches were conducted for the safety of the deputies and jail personnel as well as other inmates. (Stewart, p. 92; Wilkerson, p. 119).

In *United States v. Klein*, 522 F.2d 296 (4) (1st Cir. 1975) the court held that a brief strip search of defendant in the station house (after arrest for drug selling) conducted without abuse and in a professional manner was constitutional.

The court stated (p.300):

> "* * * A post-arrest search of the person, plainly authorized by Edwards and DeLeo, may include requiring a suspect to remove his clothes and a visual inspection of his person. Cf. United States v. Caruso, 358 F.2d 184 (2d Cir.) cert. denied, 385 U.S. 862, 87 S.Ct. 116, 17 L.Ed.2d 88 (1966). That is all that happened here. If such procedures were not permissible it would often be difficult to conduct a thorough search for weapons and contraband."

The *DeLeo* case is *United States v. DeLeo*, 422 F.2d 487 (1st Cir. 1970) cert. denied 397 U.S. 1037.

Numerous other decisions by the Circuit Courts, including the Fifth Circuit support the validity of the search policy in issue here. Two of the more recent decisions are *Thorne v. Jones*, 765 F.2d 1270 (1) (5th Cir. 1985); *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983).

Under the undisputed evidence summarized above, it is undisputed that there is physical danger not only to the Lubbock County jail personnel but to inmates resulting from the possibility of weapons, drugs and other contraband coming into the jail if the search policy is not implemented. Petitioner submits that as a matter of law under the undisputed evidence, the policy is reasonable and the balancing of interests mandates the upholding of such policy because of the undisputed physical danger to jail personnel and inmates resulting from the failure to implement such policy which far outweighs any personal privacy interest of the arrestees.

(2) Permanent injunction erroneous because Respondents failed to allege or prove standing to obtain such injunctive relief.

In a well-reasoned opinion Judge Hinojosa set forth his dissent in part from the decision of the other two judges on the panel with respect to the upholding of the injunctive relief against enforcement of the Lubbock County search policy rendered by the District Court on the ground that such claim should be dismissed for lack of federal jurisdiction since Plaintiff wholly failed to plead or prove standing to seek such injunctive relief.

In the cases at bar the pleadings and proof wholly fail to establish standing of Respondents or any jurisdic-

tional basis for the injunctive relief granted by the District Court under the decision of this Court in *City of Los Angeles v. Lyons*, 461 U.S. 95, 75 L.Ed.2d 675, 103 S.Ct. 1660 (1983) and *Brown v. Edwards*, 721 F.2d 1442 (2) (5th Cir. 1984).

The majority held that only the portion of the judgment awarding damages was before the Court on appeal.

As pointed out in the dissenting opinion only one judgment was entered in each of these cases which included an award of damages (in the Wilkerson case) and in both cases an injunction against enforcement of the search policy.

Petitioner appealed both judgments in their entirety on the ground that the Lubbock County jail search policy was not unconstitutional and which was the basis of the District Court's judgment both for awarding damages and granting injunctive relief.

It is important to note that in the Stewart case no damages were even awarded (other than $1.00 in nominal damages) since the jury found no damages and therefore in essence the only judgment which was rendered in the Stewart case was the permanent injunction against the enforcement of the Lubbock County jail search policy.

It is unequivocally clear that the judgment granting injunctive relief were before the Appellate Court for review and as set forth in the dissenting opinion it is clear that Plaintiff neither alleged nor established any standing to seek such injunctive relief.

Although the Plaintiffs sought to bring this action as a class action, the District Court denied to certify the suit for class action treatment.

(3) Abuse of discretion by the District Court in refusing to set aside default judgment for attorney's fees.

The affidavit to the Motion to Set Aside the Default Judgment with respect to attorney's fees established that the failure of the District Attorney's office to file a response was not intentional and furthermore such Motion set forth a meritorious defense.

In *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372 (D.C. Cir. 1980) the court held that the discretion in the trial court with respect to setting aside a default judgment involves consideration of whether (1) the default was willful, (2) a setting aside of such order or judgment would prejudice the plaintiff, and (3) whether the alleged defense was meritorious.

In *Greater Baton Rouge G. Ass'n. v. Recreation & Pk. Commission*, 507 F.2d 227 (1) (5th Cir. 1975) the court held that *Rule 60(b), F.R.C.P.* is a remedial provision to prevent injustice and allow parties their day in court even though some technical error has occurred which would otherwise be grounds for default.

In the case at bar by virtue of the affidavits it is established that the failure to answer was due to a clerical error in the District Attorney's office, that the Motion did not get on the calendar and the failure to answer was not willful or intentional.

Secondly, a set aside of the default judgment would not have prejudiced Plaintiff.

Thirdly, the basis of the Motion was meritorious.

Petitioner complains of the award of the attorney's fees based upon the affidavit attached to the Application for Attorney's fees which in itself shows on its face a duplication of hours.

Also, it is undisputed that the Plaintiff in the Stewart case did not prevail on her claim for damages and no damages were awarded (other than $1.00 nominal damages).

In *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983) this Court held that in a civil rights action where Plaintiff has failed to prevail on a claim that is distinct from the successful claim the hours spent on the unsuccessful claim should be excluded in considering the amount of reasonable fee permitted under the Civil Rights Attorney's Fees Award Act of 1976 *(42 U.S.C. §1988)*.

Therefore, the issue of attorney's fees should be reversed and remanded for trial on the merits and determination of proper attorney's fees in the event the judgment of the District Court is otherwise affirmed.

CONCLUSION

For the reasons and based upon the authorities above cited, the judgment of the Court of Appeals for the Fifth Circuit affirming the judgment of the District Court enjoining enforcement of the Lubbock County jail search policy should be reversed since such policy is valid and constitutional. Therefore, judgment awarding damages and attorney's fees should also be reversed and rendered.

Alternatively, judgment rendered for such injunctive relief should be dismissed on the ground that Plaintiff established no standing for entitlement to such injunctive relief.

In the further alternative, the portion of the judgment awarding attorney's fees in the Stewart case should be reversed and remanded.

WHEREFORE, Petitioners pray that this Court grant this Petition for Writ of Certiorari and that upon hearing this Court enter judgment reversing the judgment of the United States Court of Appeals and the District Court in its entirety and render judgment setting aside the injunction and the award of damages and attorney's fees.

Alternatively, Petitioners pray that the portion of the District Court's judgment rendering injunctive relief be set aside and judgment rendered upholding such policy.

Alternatively, Petitioners pray that the Court reverse and remand that portion of the judgment in the *Stewart* case awarding attorney's fees to Plaintiff.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Petition for Writ of Certiorari have been mailed on this the 17 day of Jan, 1986 to:

Mr. Mark C. Hall
P.O. Box 2187
Lubbock, Texas 79408

Mr. Marvin Rogers
West Texas Legal Services
1220 Broadway, Suite 1601
Lubbock, Texas 79401

this 17 day of Jan, 1986.

By Cecil Kuhne
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Aug. 5, 1985

Nos. 84-1199, 84-1331 and 84-1406

Paulette STEWART, Plaintiff-Appellee,

v.

LUBBOCK COUNTY, TEXAS, et al.,
Defendants-Appellants.

Barbara WILKERSON, on behalf of herself and all others similarly situated, Plaintiffs-Appellees,

v.

LUBBOCK COUNTY, TEXAS and Delwin Lee (Sonny) Keesee, individually and in his capacity as Sheriff of Lubbock County, Tx., et al.,
Defendants-Appellants.

Two actions were brought challenging county's strip search policy. The United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge, entered judgments on finding that county's strip search policy was unconstitutional, and awarded attorney fees in one of cases as well. The cases were consolidated on appeal. The Court of Appeals, Robert Madden Hill, Circuit Judge, held that: (1) county's policy of permitting a strip search of any arrestee, including minor offenders awaiting bond even though no reasonable sus-

picion existed that they, as a category of offenders or individually, might possess weapons or contraband, was an unconstitutional violation of Fourth Amendment guarantees against unreasonable searches and seizures, and (2) District Court did not abuse its discretion in failing to set aside award of attorney fees under civil rights attorney fees statute and grant an evidentiary hearing on issue of reasonableness of amount of such fees in view of county's failure to comply with response requirement contained in local rules.

Affirmed.

Hinojosa, District Judge, concurred in part, dissented in part, and filed an opinion.

1. Searches and Seizures [Key] **7(12)**

County's policy of permitting a strip search of any arrestee, including minor offenders awaiting bond even though no reasonable suspicion existed that they, as a category of offenders or individually, might possess weapons or contraband, was an unconstitutional violation of Fourth Amendment [U.S.C.A. Const. Amend. 4] guarantees against unreasonable searches and seizures.

2. Federal Courts [Key] **830**

Standard for review of denial of motion to set aside default judgment for attorney fees under civil rights attorney fees statute [42 U.S.C.A. § 1988] is whether district court abused its discretion.

3. Civil Rights [Key] **13.17(22)**

District court did not abuse its discretion in failing to set aside award of attorney fees under civil rights attorney fees statute [42 U.S.C.A. § 1988] against county in suit successfully challenging county's strip search policy and grant an evidentiary hearing on issues of reasonableness of amount of such fees in view of county's failure to comply with response requirement contained in local rules. U.S. Dist. Ct. Rules N.D. Tex., Rule 5.1(e).

Jim Bob Darnell, Crim. Dist. Atty., Kay P. Fletcher, Asst. Crim. Dist. Atty., Cecil Kuhne, Lubbock, Tex., for defendants-appellants.

Marvin Rogers, Mark C. Hall, Lubbock, Tex., for plaintiff-appellee.

Marvin Rogers, West Texas Legal Services, Nathan Hult, Mark C. Hall, Lubbock, Tex., for plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before JOHNSON, HILL, Circuit Judges, and HINOJOSA*, District Judge.

ROBERT MADDEN HILL, Circuit Judge:

Lubbock County, Texas, and officials of the Sheriff's Department, defendants, in these two consolidated cases on appeal allege legal error in the district court's ruling that the County's strip search policy was unconstitutional. In the Stewart case, defendants also allege that

---

*District Judge of the Southern District of Texas, sitting by designation.

the district court abused its discretion in refusing to set aside a default judgment for attorney's fees. We agree with the district court's ruling that the strip search policy was unconstitutional and affirm the judgments in both cases. We also affirm the award of attorney's fees in the Stewart case.

FACTS AND PROCEDURAL HISTORY

The policy at the Lubbock County jail prior to the issuance of temporary and permanent injunctions by the district court permitted a strip search of any arrestee. The searches did not depend upon the severity of the charge. Thus, all citizens arrested for misdemeanors punishable by fine only (Class C) were strip searched at the Lubbock County jail pursuant to jail policy. Furthermore, there was no requirement that the arrestee be suspected of possessing weapons or contraband for a strip search to be conducted. These searches, approximately 1000 per month, were conducted before arraignment and before the arrestee had an opportunity to arrange for bail. Thus, persons such as the plaintiffs, Paulette Stewart and Barbara Wilkerson, were subject to strip searches upon arrest for misdemeanors punishable only by fine.[1]

Both plaintiffs sued Lubbock County and county officials in federal district court.[2] In addition to receiving damages, the plaintiffs sought to enjoin the strip search

[1]Paulette Stewart had been arrested for public intoxication and Barbara Wilkerson had been arrested on an outstanding warrant for issuing a bad check after a routine traffic stop.

[2]Stewart sued for damages under 42 U.S.C. § 1983 for injuries received in a scuffle during her strip search and was awarded $1 in nominal damages. Wilkerson also sued for damages under § 1983 for her strip search and was awarded $15,000 in damages.

policy in effect. A permanent injunction was issued by the district court in the Stewart case.

Two questions are presented on appeal:[3] whether the district court erred in holding the strip search policy of

[3]The injunction issued by the district court is not before us on appeal. Accordingly, we do not determine whether injunctive relief was appropriate in this case, nor do we reach the merits of the injunction. We note, however, that in light of *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), we would raise *sua sponte* the question of plaintiffs' standing to seek injunctive relief were the injunction before us on appeal. *See Brown v. Edwards*, 721 F.2d 1442, 1446 (5th Cir. 1984). Plaintiffs may not be able to show that they would again be arrested and therefore be again subject to the unconstitutional strip search policy of the Lubbock County Sheriff's Department. *See Lyons*, 461 U.S. at 102, 103 S.Ct. at 1665; *Brown*, 721 F.2d at 1447. *But see Giles v. Ackerman*, 746 F.2d 614, 619 (9th Cir. 1984) (plaintiff with standing to bring damages action has standing to obtain injunctive relief in addition to damages). *Cf. Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1266 (7th Cir. 1983) (class action; injunction by agreement and stipulation). In the present case, on appeal appellants pray only that the trial court's ruling of law that the strip search policy is unconstitutional and that Wilkerson's $15,000 damage award be reversed. No relief from the permanent injunction is sought.

The dissent would consider the injunction which is not before us on appeal and dismiss it on jurisdictional grounds (J. Hinojosa, dissenting). The dissent argues primarily that we may consider the injunction because we may and indeed must raise jurisdictional issues *sua sponte*. We agree completely that this Court could and should raise *sua sponte* any questions concerning jurisdiction in matters properly before this Court. However, we find that only the judgments regarding damages are before us on appeal and that the permanent injunction which the dissent would dismiss is not part of this appeal.

The cases cited by the dissent in support of the proposition that we should raise the issue of jurisdiction *sua sponte* even if not raised by the parties involved injunctions and other matters actually before the appellate court. *See Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) (Supreme Court *sua sponte* raised standing of some class members released from jail after contempt proceedings to seek injunctive relief; finding that other class members had standing, the Supreme Court reached the merits concerning the applicability of Younger principles); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963) (Supreme Court noted that it may reexamine jurisdiction of the district court to enjoin an order of the National Labor Relations Board although not raised by the parties); *Brown*, 721 F.2d at 1446 (this Court considered *sua sponte* Brown's standing to seek equitable relief in appeal of dismissal of section 1983 action for damages and injunctive relief);

the Lubbock County Sheriff's Department unconstitutional as a matter of law; and whether the district court abused its discretion in refusing to set aside a default judgment for attorney's fees against Lubbock County.

ANALYSIS

I. Constitutionality of the Strip Search Policy

Plaintiffs urge that the strip search policy of the defendants is violative of the Fourth Amendment.[4] The Seventh Circuit has provided guidance for the balancing of interests in determining the constitutionality of strip searches under the Fourth Amendment. *See Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983). In *Mary Beth G.* a challenge was made to the strip search policies of the city of Chicago. In finding the policies to be unconstitutional, the court both relied on and distin-

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Save the Bay, Inc. v. United States Army, 639 F.2d 1100 (5th Cir. 1981) (this Court in the appeal of an order in part granting injunctive relief considered *sua sponte* whether the order was appealable); *United States v. Rochelle*, 363 F.2d 225 (5th Cir. 1966) (this Court *sua sponte* raised question of the jurisdiction of the district court in a suit involving bankruptcy and income tax). These cases require only that the jurisdiction of this Court or a district court over matters before this Court be raised by us even when the parties did not raise it and the district court did not consider it. In fact, in *Brown*, this Court considered jurisdiction separately for the damage claims and injunctive relief, although in *Giles*, the Ninth Circuit found that jurisdiction over damage claims would also sustain jurisdiction over any additional (injunctive or declaratory) relief sought.

We observe, further, that were we to reach the merits as to the injunction, we would vacate section F of the injunction and remand to the district court for a revision of the injunction to clearly permit misdemeanor and traffic violation arrestees to be strip searched even while awaiting bond if reasonably suspected of possessing weapons or contraband.

[4]The right of the people to be secure in their persons, homes, papers and effects; against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. Const. amend. IV.

guished *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). It relied on *Wolfish* for the standard of determining "reasonableness" of searches:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

723 F.2d at 1271 (citing *Wolfish*, 441 U.S. at 559, 99 S.Ct. at 1884). It also distinguished the holding of *Wolfish* that strip searches may be conducted with less than probable cause by specifying that pre-trial detainees in *Wolfish* "were awaiting trial on serious federal charges after having failed to make bond and were being searched after contact visits." 723 F.2d at 1272. The court in *Mary Beth G.* found that the city of Chicago's need for strip searching "minor offenders who were not inherently dangerous and who were being detained only briefly while awaiting bond . . . when there was no reason to believe they were hiding weapons or contraband on their persons" did not outweigh the personal privacy interest of the detainees. 723 F.2d at 1272. It found the strip searches unreasonable without a reasonable suspicion by the authorities that either weapons or contraband might be concealed on the bodies of the detainees. *Id.* at 1273.

The Fourth Circuit has also applied and distinguished *Wolfish* in the case of an arrestee facing a charge of driving while intoxicated who was strip searched without

any reasonable suspicion that she might be in possession of either a weapon or contraband. *See Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982). The court pointed out that although Logan's offense was "not a minor traffic offense, [it] was nevertheless one not commonly associated by its very nature with the possession of weapons or contraband. . . ." *Id.* at 1013. It also considered relevant to its conclusion of the unconstitutionality of the strip search policy that "there was no cause in [Logan's] specific case to believe that she might possess either [weapons or contraband]." *Id.*

In the cases *sub judice*, similarly to *Mary Beth G.*, the detainees were arrestees awaiting bond on misdemeanor or traffic violation charges. Lubbock County argues that the strip search policy of the Chicago Police Department which it admits was similar to its own was unreasonable because it was enforced only against female arrestees. While the Seventh Circuit held that such disparity in treatment did violate the equal protection clause of the Fourteenth Amendment, that violation was clearly stated to be an "additional ground" for finding the strip search policy unconstitutional. *Mary Beth G.*, 723 F.2d at 1274. Lubbock County's argument that *Mary Beth G.* is inapplicable to the present cases is entirely without merit.

[1] Because Lubbock County's strip search policy was applied to minor offenders awaiting bond when no reasonable suspicion existed that they as a category of offenders or individually might possess weapons or contraband, under the balancing test of *Wolfish* we find such

searches unreasonable and the policy to be in violation of the Fourth Amendment.

II. Attorney's Fees

Lubbock County argues in the *Stewart* case that the district court abused its discretion by not setting aside a default judgment for attorney's fees under 42 U.S.C. § 1988.[5] The court had received an application for an award of attorney's fees on March 9, 1984. Under Local Rule of Practice 5.1(e) defendants had 20 days to respond to the motion.[6] Further, the court entered an order 3 days later, on March 12, stating that any opposing briefs shall be filed within 20 days of the order. On April 4, after the deadline in the order, the court granted Stewart's application for attorney's fees. Thereafter, defendants filed a motion to vacate judgment. It is the denial of this motion that defendants now appeal.

[2] The standard for review is whether the district court abused its discretion. *See, e.g., Moldwood Corp. v. Stutts*, 410 F.2d 351, 352 (5th Cir. 1969). The district court, in its order granting attorney's fees in the amount requested, noted that defendants had not responded in any way to the court's earlier order setting the time for their response, and it concluded that the defendants therefore agreed that Stewart's request was reasonable as to the number of hours expended and to the per hour

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[5]Section 1988 provides in part:

> In any action or proceeding to enforce a provision or section [ ] . . . 1983 . . ., the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of costs.

[6]This rule provides:

> Any response to a motion shall be filed within 20 days from the date of filing of the motion.

fee requested. The district court applied the standards of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) and considered the factors specified in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). The court found that the hours expended and the hourly rate were reasonable. Further, relying on *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) it found that the defendants, having failed to submit any evidence, had waived their right to an evidentiary hearing.

In their motion to vacate judgment, defendants asserted that they had been unable to find a copy of the March 12 briefing order in any of their files, and requested relief for "mistake, inadvertence, . . . or excusable neglect" under Fed.R.Civ.P. 60(b)(1). The district court, relying on the requirement of Local Rule of Practice 5.1(e) that a response be filed within 20 days of the filing of a motion, denied defendants' motion to vacate judgment. Thus, defendants' reliance on their inability to find the March 12 order informing them of the 20-day requirement is misplaced: the order was merely a reminder of the response requirement contained in the local rules (although it extended the 20 day period to respond by stating it from the date of the order).

[3] We find no abuse of discretion in the district court's failure to set aside the award of attorney's fees and to grant an evidentiary hearing on the issue of the reasonableness of amount of the award of such fees. The award of attorney's fees in the Stewart case is affirmed.

AFFIRMED.

HINOJOSA, District Judge, concurring in part and dissenting in part:

I concur with Judge Hill's opinion on the constitutionality of the strip search policy of the Lubbock County Sheriff's Department with respect to these particular Plaintiffs' claims for damages[1] and on the propriety of the

[1]The majority holds that "[b]ecause Lubbock County's strip search policy was applied to minor offenders awaiting bond when no reasonable suspicion existed that they as a category of offenders or individually might possess weapons or contraband, under the balancing test of *Wolfish* we find such searches unreasonable." *Supra* at slip op. p. 5896, 767 F.2d at p. 156. I do not understand this holding to limit the "reasonableness" test as articulated in *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), to only situations in which suspicion exists that the arrestee possesses weapons or contraband. Each case must be considered in light of all the circumstances surrounding the particular search. *Id.* For example, I have no doubt that it is not unreasonable to strip search minor offenders when, due to overcrowding, they must be placed temporarily with the more serious offenders. A provision to this effect was made a part of the permanent injunction issued by the district court in these cases.

I also note that, under the *Wolfish* balancing test, normally a factual inquiry would need to be made to determine if, in light of the particular circumstances, a search is reasonable. The district court in these cases appears to have ruled in issuing the injunction that the county's strip search policy was unconstitutional on its face. I have concluded that the court lacked jurisdiction to issue this injunction. *See infra*. The same article III standing defect that deprived the district court of jurisdiction to consider the Plaintiffs' claims for injunctive relief also barred any declaratory relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 1666, 75 L.Ed.2d 675 (1983) (citing *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969)); *Brown v. Edwards*, 721 F.2d 1442, 1447 (5th Cir. 1984). In addition, other than in the context of the first amendment, it is usually improper to consider statutory or policy applications to third parties not before the court. *See United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960). Even assuming that the district court could have declared the policy unconstitutional, the Plaintiffs in these cases would still have to prove that *their* constitutional rights were violated. *See id.; New York v. Ferber*, 458 U.S. 747, 767-68, 102 S.Ct. 3348, 3359-61, 73 L.Ed.2d 1113 (1982). Despite this, the district court instructed the jury in both cases that the county had violated the Plaintiff's constitutional rights and that the only issue was the amount of damages. Normally, a factual inquiry would be necessary before deciding this constitutional question. Here, however, the record reveals that the Defendants have virtually stipulated that no special circumstances existed which required a strip search

district court's entry of default judgment for attorney's fees. I dissent in part, however, because I conclude that this Court, based on lack of federal jurisdiction, should have reversed the district court's judgment granting the Plaintiffs' claims for injunctive relief.

In this Court's opinion the majority conclude that "[t]he injunction issued by the district court is not before us on appeal." *Supra* at note 3. The majority note that if the injunction was before this panel on appeal, they would have raised *sua sponte* the issue of the Plaintiffs' standing to seek injunctive relief. *Id.* In my opinion this issue, which goes to the article III threshold requirement for federal court jurisdiction, *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983), is sufficiently before this Court on appeal.

Lubbock County's brief stated the substantive issue on appeal for both of these consolidated cases as follows: "The Court erred in ruling, as a matter of law, that the strip search policy of the Lubbock County Sheriff's Department was unconstitutional."[2] This ruling was first

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of these minor offenders. Further, the Defendants have not raised this issue on appeal. Therefore, I concur in the majority's holding only to the extent that it declares that the county's strip search policy violated the constitutional rights of these particular Plaintiffs and would affirm the damages awarded to them.

[2]The majority "find[s] that only the judgments regarding damages are before us on appeal." *Supra* at note 3. As can be seen from the district court's rulings relating to the constitutionality of the County's strip search policy, a summary of which is set forth in the text that follows, there are no separate "judgments regarding damages," and, in my opinion, the damages award and the injunction are intertwined with the district court's ruling on the constitutional question.

I also note that in its briefs the County has not contested the propriety of a damages award or the amount of the damages awarded, given the district court's ruling on the constitutional question. Instead, the County has raised the issue of the court's legal ruling that directly resulted in both the issuance of the injunction and the award of damages.

made by the district court in its order entering a temporary injunction against Lubbock County in Plaintiff Barbara Wilkerson's case. After a jury refused to award damages to Plaintiff Paulette Stewart, the Court issued a memorandum in which it reaffirmed its ruling in issuing the temporary injunction in Wilkerson's case that the county's strip search policy was unconstitutional. In accordance with this memorandum, the district court entered judgment against Lubbock County in Stewart's case. The district court's judgment awarded Stewart one dollar in damages and ordered a permanent injunction. The judgment entered by the court in Wilkerson's case awarded a total of $15,000 in damages as found by a jury and adopted the permanent injunction entered in Stewart's case.

Since the district court made its ruling that Lubbock County's strip search policy was unconstitutional in its order issuing the temporary injunction, which later was made permanent in both cases, it is particularly difficult for me to understand how the jurisdictional issue of the Plaintiffs standing to seek injunctive relief is not before us. It is, of course, a familiar rule of appellate review that jurisdictional issues, particularly the article III case or controversy requirement, should be examined on appeal even if not raised by the parties or the court below. *See Juidice v. Vail*, 430 U.S. 327, 331, 97 S.Ct. 1211, 1215, 51 L.Ed.2d 376 (1977); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16, 83 S.Ct. 671, 674, 9 L.Ed.2d 547 (1963); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir. 1981); *United States v. Rochelle*, 363 F.2d 225, 230 (5th Cir. 1966). This practice was recently followed by

another Fifth Circuit panel who raised *sua sponte* the same standing issue in an analogous factual context. *Brown v. Edwards*, 721 F.2d 1442, 1446 (5th Cir. 1984).

In this appeal the majority recognize that jurisdictional issues should be considered *sua sponte* by an appellate court. They have concluded, however, that the injunction is not before us. Apparently, the majority would have considered the Plaintiffs' standing to seek injunctive relief if the county had challenged the injunction on other grounds (for example, because it was overly broad), but will not consider the standing issue when, as here, the county has challenged the district court's ruling that directly led to the issuance of the injunction. It seems to me that this distinction, which appears to be based on how far off the party misses the jurisdictional issue, likewise misses the point.

The rationale for requiring a federal court to examine jurisdictional issues not raised by the parties is that "[f]ederal courts are courts of limited jurisdiction" and may not proceed without congressionally or constitutionally conferred jurisdiction. *Save the Bay, Inc. v. United States Army*, 639 F.2d at 1102. As developed more fully below, in these cases the district court was without jurisdiction to consider the Plaintiffs' claims for injunctive relief, and, therefore, this Court should raise the standing issue *sua sponte*.

In accordance with principles recently articulated by the Supreme Court in *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), I conclude that Plaintiffs' claims for injunctive relief do not satisfy the article III case or controversy requirement.

See also Brown v. Edwards, 721 F.2d at 1446-47. These issues were not present in the Seventh Circuit's decision in *Mary Beth G. v. City of Chicago* since apparently the "parties . . . entered into an agreement and stipulation in settlement of the plaintiff's claims for injunctive relief." 723 F.2d 1263, 1266 (7th Cir. 1983).

In *Lyons* the Supreme Court stated that "[p]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." 103 S.Ct. at 1666. Thus, in order to show that Lubbock County's strip search policy would be unconstitutionally applied to injure the Plaintiffs in the future, and thereby establish an actual controversy with respect to injunctive relief, Plaintiffs would have had to allege the following: (1) that Plaintiffs would have another encounter with the police, (2) that this encounter would result in an arrest for a traffic or minor offense, and (3) that Plaintiffs would be brought to the booking area of the county jail and strip searched under conditions in which there was no constitutionally permissible basis for such a search. *See id.* at 1667-1669; *see also O'Shea v. Littleton*, 414 U.S. 488, 496-98, 94 S.Ct. 669, 676-77, 38 L.Ed.2d 674 (1974).

While Lubbock County's clear strip search policy may make these closer cases than that in *Lyons*, "in any event, to have a case or controversy with the [county] that could sustain [the claims for injunctive relief], [Plaintiffs] would have to credibly allege that [they] faced a *realistic* threat from the future application of the [county's] policy." *City of Los Angeles v. Lyons*, 103 S.Ct. at 1668 n. 7 (emphasis added). Even assuming Plaintiffs had made these allegations, anticipating whether these

Plaintiffs would be arrested for a violation of the law and subsequently strip searched at the county jail "takes us into the area of speculation and conjecture." *See O'Shea v. Littleton*, 414 U.S. at 498, 94 S.Ct. at 677.

Moreover, here the Plaintiffs have not even made the above allegations. Both Plaintiffs made virtually identical allegations supporting their claims for injunctive relief. Plaintiff Wilkerson's complaint alleged that she "*may* suffer irrevocable injury, loss, and harm and the accompanying humiliation, degregation [sic], and emotional stress *if* she is again subject to an arrest and strip search as she has been on the occasion as alleged above" (emphasis added).

In *Brown v. Edwards*, 721 F.2d 1442 (5th Cir. 1984), the Plaintiff had been arrested and subsequently brought a section 1983 action challenging the constitutionality of the Mississippi fee system for constables. In holding that Brown lacked standing to seek equitable relief, this Court noted that "Brown's complaint does not allege, and nothing in the record suggests, that Brown is in any way likely, or more likely than any other Mississippian to be again subjected to arrest or charging by any Mississippi constable." *Id.* at 1446. Likewise, here there is nothing to suggest that these Plaintiffs are any more likely than any other citizen of Lubbock County to again be arrested and strip searched. In my opinion, the Plaintiffs' claims for injunctive relief clearly do not allege an actual case or controversy as required by Article III of the Constitution.[3]

[3]Plaintiff Wilkerson's suit was originally brought as a class action. The existence of a certified class would change the above analysis somewhat, although my view is that the result would be the same since Wilkerson, as

The Ninth Circuit has taken the position that if a plaintiff has standing to bring an action for damages, the plaintiff also has standing to assert a claim for injunctive relief. *Giles v. Ackerman*, 746 F.2d 614, 619 (9th Cir. 1984). The Ninth Circuit reached this conclusion after observing that in *Lyons* the damages claim had been severed from the claim for injunctive relief by the time the case reached the Supreme Court. *Id.; see City of Los Angeles v. Lyons*, 103 S.Ct. at 1667 n. 6.

While the Ninth Circuit's position is an understandable attempt to mitigate the arguably severe case or controversy rule dictated by *Lyons*, I doubt that this approach squares with the Supreme Court's holdings in this area. In *Lyons* the original complaint sought damages in counts I through IV and injunctive relief in count V. While the Supreme Court noted that the parties agreed to sever the damage and injunctive claims after the case's first appeal, the court broadly held that "[u]nder *O'Shea* and *Rizzo*, these allegations [that Lyons would again be injured by application of the City's choke hold policy] were an insufficient basis to provide a federal court with jurisdiction to entertain count V of the complaint." *City of Los Angeles v. Lyons*, 103 S.Ct. at 1668. This holding leads me to believe that the Court would have reached the same conclusion on the claim for injunctive relief even if the damages claim had not been severed.

In addition, the Ninth Circuit's approach is inconsistent with this Circuit's application of *Lyons* in *Brown v. Edwards*, 721 F.2d at 1446-47. In *Brown* this Court

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class representative, would still be required to have standing. *See O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). The record reveals, however, that the class was never certified.

applied *Lyons* and held that the plaintiff lacked standing to seek injunctive relief in a case in which the damages claim was not severed from the claim for equitable relief. The Supreme Court's answer to the effect of withholding injunctive relief was that the plaintiff, as is the case here, had a remedy for damages under section 1983 which would, along with possible federal criminal civil rights sanctions, deter future violations of the important rights at issue. *City of Los Angeles v. Lyons*, 103 S.Ct. at 1671.

In sum, I conclude that we should have raised *sua sponte* the issue of the Plaintiffs' standing to seek injunctive relief and that the claims for injunctive relief should have been dismissed for lack of federal jurisdiction.[4]

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[4]Other than the jurisdictional question that we should raise *sua sponte* and find dispositive in these cases, I would have two additional concerns regarding the injunction. First, even if the Plaintiffs had article III standing to assert their claims for injunctive relief, they, in all likelihood, could not demonstrate the irreparable harm that is a prerequisite to equitable relief. *See City of Los Angeles v. Lyons*, 103 S.Ct. at 1670-71. Second, I question whether the injunction, which permanently designates (absent application to federal court) particular sections of the county jailhouse for particular purposes and permanently mandates a particular processing procedure for arrestees, is overly intrusive to the point that federalism concerns are raised. *See Rizzo v. Goode*, 423 U.S. 362, 379-80, 96 S.Ct. 598, 608-09, 46 L.Ed.2d 561 (1976); *Ruiz v. Estelle*, 679 F.2d 1115, 1144-45 (5th Cir. 1982).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. CA-5-83-26

BARBARA WILKERSON, Plaintiff,

v.

LUBBOCK COUNTY, TEXAS;
DELWIN LEE (SONNY) KEESEE, Individually and in his capacity as Sheriff of Lubbock County, Texas;
LANNY RICE, TAMMY GUYTON, and JAMES GROSS, Lubbock County Sheriff's Deputies, individually and in their official capacity, Defendants.

JUDGMENT

This action came on for trial before the court and a jury, the undersigned Judge presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered, Adjudged and Decreed:

(1) That the plaintiff, Barbara Wilkerson, shall recover of and from Lubbock County, Texas, Delwin Lee (Sonny) Keesee, Lanny Rice, Tammy Guyton, and James Gross, jointly and severally, the sum of $10,000.00. The judgment against the individuals is here entered against them in both their individual and official capacities.

It is further Ordered, Adjudged and Decreed that the plaintiff, Barbara Wilkerson, shall have and recover of

and from Lubbock County, Texas and Delwin Lee (Sonny) Keesee, individually and in his official capacity, jointly and severally, the sum of $5,000.00.

All sums here recovered shall bear interest at the rate of 10.11% per annum from this date until paid, and all costs are assessed against the defendants jointly and severally.

It is further Ordered and Decreed that the defendants, and each defendant herein, are hereby enjoined all in accordance with the Temporary Injunction entered by this court on March 22, 1983, which Temporary Injunction was made permanent and modified in instruments entitled "Permanent Injunction" and "Memorandum" dated February 8, 1984 and filed and entered in CA-5-82-104, *Paulette Stewart v. Lubbock County, Texas, et al.*

The Clerk will furnish a copy hereof to each attorney.

DATED and ENTERED this 13th day of March, 1984.

/s/HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. CA-5-83-26

BARBARA WILKERSON, Plaintiff,

v.

LUBBOCK COUNTY, TEXAS;
DELWIN LEE (SONNY) KEESEE, Individually and in his capacity as Sheriff of Lubbock County, Texas;
LANNY RICE, TAMMY GUYTON, and JAMES GROSS, Lubbock County Sheriff's Deputies, individually and in their official capacity, Defendants.

AMENDED JUDGMENT

Judgment was entered in this case on March 13, 1984. Pursuant to an unopposed Motion of the Plaintiff, the Judgment is amended to provide that the $5,000.00 punitive damages award found by the jury against Defendant Delwin Lee (Sonny) Keesee, be assessed only against Defendant Keesee, individually and in his official capacity, and not against Lubbock County, Texas.

In all other respects, the Judgment of this court dated and entered March 13, 1984, remains unchanged.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 14th day of March, 1984.

/s/HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. CA-5-82-104

PAULETTE STEWART, Plaintiff,

v.

LUBBOCK COUNTY, TEXAS;
DELWIN LEE (SONNY) KEESEE, in his official capacity as Sheriff of Lubbock County, Texas;
DEPUTY SHERIFFS GERALD REESE, VICKIE COOPER, BETTY BAXTER, L. RICE, and J. LOCK, in their official capacities as officers of the Lubbock County Sheriff's Office; and
SERGEANT PAULA CLEMENTS, in her official capacity, Defendants.

JUDGMENT

The above-entitled and numbered cause came on to be tried on January 9th and 10th, 1984 with all parties and attorneys in attendance. The jury has returned its verdict and the court has issued its Memorandum of even date herewith, and a decision has now been reached that the following judgment should be entered:

It is Ordered, Adjudged and Decreed that the plaintiff, Paulette Stewart, shall recover of and from the defendants, Lubbock County, Texas; Delwin Lee (Sonny) Keesee, in his official capacity as Sheriff of Lubbock County, Texas; Deputy Sheriffs Gerald Reese, Vickie

Cooper, Betty Baxter, L. Rice, and J. Lock, in their official capacities as officers of the Lubbock County Sheriff's Office; and Sergeant Paula Clements, in her official capacity, the sum of One Dollar ($1.00).

Further, a permanent injunction will be ordered in accordance with the court's Memorandum of even date.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this ____ day of February, 1984.

/s/HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. CA-5-82-104

PAULETTE STEWART, Plaintiff,

v.

LUBBOCK COUNTY, TEXAS;
DELWIN LEE (SONNY) KEESEE, in his official capacity as Sheriff of Lubbock County, Texas;
DEPUTY SHERIFFS GERALD REESE, VICKIE COOPER, BETTY BAXTER, L. RICE, and J. LOCK, in their official capacities as officers of the Lubbock County Sheriff's Office; and
SERGEANT PAULA CLEMENTS, in her official capacity, Defendants.

MEMORANDUM

The above case was heard before a jury on the 9th and 10th of January, 1984 with all parties and counsel present. The jury returned its verdict in which it refused to award any damages to the plaintiff.

This court in Cause No. CA-5-83-26, *Barbara Wilkerson v. Lubbock County, Texas, et al.*, has previously held, in issuing its Temporary Injunction, that the strip search of an individual arrestee by law enforcement officers in Lubbock County, Texas was an invasion of privacy and deprivation of the arrestee's constitutional

rights and gave rise to a cause of action pursuant to 42 U.S.C. § 1983.

The court's Temporary Injunction in CA-5-83-26 is attached hereto and made a part hereof.

Accordingly, this court does again reaffirm its findings in CA-5-83-26 and concludes that a permanent injunction should be awarded against the defendants prohibiting a strip search of arrestees except under certain conditions. The plaintiff has established in this case that she has been deprived of her constitutional rights and that pursuant to 42 U.S.C. § 1983 has a cause of action against the defendants and this court has jurisdiction under 28 U.S.C. § 1343. The plaintiff in this case is entitled to nominal damages and the injunction.

A judgment will be entered awarding plaintiff $1.00 damages.

Further, a permanent injunction will be issued enjoining the defendants from strip-searching any individual arrestee except under certain exceptions as set forth in the Temporary Injunction issued in CA-5-83-26. Further, the injunction to be issued in this case will be a modification of the Temporary Injunction issued in CA-5-83-26 so as to permit the defendants to strip search an individual when the number of persons being held in the West building exceeds forty-five (45) persons at any one time rather than sixty-five (65) as set forth in Paragraph E of the Temporary Injunction. Further, nothing in the injunction would prevent the defendants from requiring arrestees to shower and be issued jail clothing before being put in the holding area in the East building. Such arrestees may be allowed to remove his or her clothing

and shower behind the shower curtains and in complete privacy.

The attorneys for all parties in this case have agreed to the above modification and have so notified the court.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 8th day of February, 1984.

/s/HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. CA-5-82-104

PAULETTE STEWART, Plaintiff

v.

LUBBOCK COUNTY, TEXAS, et al., Defendants.

ORDER

On March 9, 1984, plaintiff's attorneys in the above-styled and numbered cause filed an application for an award of attorneys' fees pursuant to 42 U.S.C. § 1988. Although this court entered an order requiring defendants to respond to the request within 20 days, defendants have *not* responded in *any way* to the plaintiff's request or this court's order. Thus, this court *must* assume that defendants agree that plaintiff's request is reasonable as to the number of hours expended and to the per hour fee requested.[1]

Therefore, plaintiff's application for attorneys' fees in the amount of $17,027.50[2] is GRANTED. This court has reviewed the pleadings, memoranda, and affidavits

[1]"[Defendants] failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged, . . ., or the facts asserted in the affidavits submitted by [defendants'] counsel. [They] therefore waived [the] right to an evidentiary hearing before the court." *Blum v. Stenson*, 52 U.S.L.W. 4377, 4378 n. 5 (March 20, 1984).

[2]The application actually requests $18,951.25; however, multiplying hours times rates requested actually yields $17,027.50, as stated in Exhibit A, Affidavit of Marvin Rogers.

attached in view of the recent decision, *Hensley v. Eckerhart*, ____ U.S. ____(1983). Beginning with the presumption that a reasonable fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly fee, then making adjustments as necessary in this particular case, the court finds the amount requested reasonable. None of the factors of *Johnson v. Georgia Highway Express*[3] warrant an adjustment of the fee. The court specifically follows *Blum, supra*, in awarding fees at market rate and in declining to enhance the award of fees.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 4th day of April, 1984.

/s/HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

[3]488 F.2d 614 (5th Cir. 1974).

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1241

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LUBBOCK COUNTY, TEXAS, et al., *Petitioners*

vs.

PAULETTE STEWART, *Respondent*

LUBBOCK COUNTY, TEXAS, et al., *Petitioners*

vs.

BARBARA WILKERSON, *Respondent*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Respondents' Brief in Opposition

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28 pp

QUESTIONS PRESENTED

1.

Whether Petitioners, who neither argued nor briefed the injunction questions below, preserved them for review in this Court.

2.

Whether Petitioners, who do not challenge here the holdings below that their strip search policy is unconstitutional, may complain now for the first time that its enforcement was improperly enjoined.

3.

Whether Petitioners, who wholly failed to respond to Respondents' motion for attorney fees in District Court, preserved the issue of Respondents' default judgment for attorney fees for review in this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

ADDITIONAL PROVISIONS WHICH THE CASE INVOLVES 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

1. Petitioners Did Not Preserve the Injunction Questions for Certiorari Review 5

2. Petitioners May Not Complain That Their Unconstitutional Strip Search Policy Was Improperly Enjoined 7

3. Petitioners Did Not Preserve the Award of Attorney Fees for Certiorari Review 10

CONCLUSION 11

CERTIFICATE OF SERVICE 12

APPENDIX A-1

TABLE OF AUTHORITIES

Cases Page

Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983) 7

Bell v. Wolfish, 441 U.S. 520 (1979) 8, 9
Blum v. Stenson, 465 U.S. 886 (1984) 10, 11

Delaware v. Prouse, 440 U.S. 648 (1979) 9
Doe v. Bolton, 410 U.S. 179 (1973) 9

Hallie, Town of, v. City of Eau Claire, — U.S. —, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985) 6
Heckler v. Campbell, 461 U.S. 458 (1983) 6
Hensley v. Eckerhart, 461 U.S. 424 (1983) 10-11
Hoover v. Ronwin, — U.S. —, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), *reh. denied*, — U.S. —, 104 S.Ct. 3564, 82 L.Ed.2d 865 (1984) 6, 7

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) ... 8

San Pedro and Cañon del Água Company v. United States, 146 U.S. 120 (1892) 6-7
Singleton v. Wulff, 428 U.S. 106 (1976) 7

Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985) 7, 8
Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th cir. 1980) 8

United States v. Klein, 522 F.2d 296 (1st Cir. 1975) 7
United States v. Ortiz, 422 U.S. 891 (1975) 6, 7
United States v. Ruigomez, 702 F.2d 61 (5th Cir. 1983) 7, 8
United States v. Sandler, 644 F.2d 1163 (5th Cir. 1981) 8

Constitutional Provisions

U.S. Const., amend. IV 2, 5, 9, 10

Statutes

42 U.S.C. § 1983 7

42 U.S.C. § 1988 ..... 5, 10

Miscellaneous

U.S. District Court for the Northern District of Texas Local Rule 5.1 (e) 2

No. 85-1241

IN THE

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PAULETTE STEWART, *Respondent*

LUBBOCK COUNTY, TEXAS, et al., *Petitioners*

vs.

BARBARA WILKERSON, *Respondent*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Respondents' Brief in Opposition

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit in this case is reported at 767 F.2d 153. Although Petitioner Lubbock County's Appendices include that opinion, as well as certain judgments, memorandums and orders of the District Court, Lubbock County failed to append the temporary injunction which is the very subject of its Petition to this Court. That injunction was made permanent and incorporated into both judgments below (Petition App., p. 22-23) and

(Petition App., p. 19-29), and it is included here as Appendix A.

ADDITIONAL PROVISIONS WHICH THE CASE INVOLVES

Local Rule 5.1 (e) of the United States District Court for the Northern District of Texas provides, in pertinent part:

> (e) *Time for Response.* In a civil action, any response to a motion shall be filed within 20 days from the date the motion was filed. * * * Motions shall be deemed ready for disposition at the end of these periods, unless the Presiding Judge grants an extension of time for filing a response.

STATEMENT OF THE CASE

In two separate civil rights actions, the District Court held Lubbock County's policy of strip searching all pre-booking detainees in the Lubbock County Jail, including those charged with Class C misdemeanors punishable by fine only, to be violative of the Fourth Amendment to the United States Constitution. (Petition App., p. A-4-6). The Court awarded damages and enjoined enforcement of the policy, with certain exceptions not applicable here, before a detainee is arraigned or has an opportunity to make bond. In a separate proceeding, when Lubbock County failed to make any response to Stewart's attorneys' application for attorney fees, the District Court awarded attorney fees in Stewart's case in the amount of $17,027.50. (Petition App., p. A-27).

Lubbock County merely appealed the finding of unconstitutionality and the award of attorney fees, and a panel

of the Court of Appeals for the Fifth Circuit affirmed. Only on Petition for Rehearing did the County complain of the injunctive relief that was granted. Its Petition for Rehearing was summarily overruled, and the mandate issued January 17, 1986.

Lubbock County's strip search policy is set forth *verbatim* in Appendix B. The County is simply wrong when it represents to this Court that "the strip search policy in the case at bar does not authorize or permit body cavity searches and involves only a visual strip search." (Petition, p. 3, 6). While the policy does not permit any "probing," body cavities including the nose, ears, mouth and rectum are to be visually inspected and a hand is to be "run . . . into groin area to search for contraband." In addition to the groin search, the policy requires physical contact with the prisoner's hair, arms, armpits, soles of feet, and between the prisoner's fingers and toes, as well as under bandages and inside false teeth and artificial limbs, and the prisoner is required "to bend over and spread buttocks" for the rectal inspection. (Appendix B, p. A-9 - A-10).

The District Court's injunction (Appendix A) only prohibits Lubbock County from strip searching individual arrestees and placing them in the general jail population before bond has been set by a magistrate and the individual arrestees have had an opportunity (as defined in the injunction) to make a bond.[1] (Appendix A, p. A-4). It does

[1]As the District Court found (*see*, Appendix A), the Lubbock County Jail consists of two buildings which are separated by a "sally port." The west building houses the booking rooms, property rooms, two dressing rooms (for male and female), and 17 holding cells. Ten of these are for special purposes such as for violent prisoners and detoxification. The remaining seven can accommodate as many as 56 prisoners. This building was designed to

not prohibit (and indeed it specifically allows) the Sheriff or deputies to conduct a thorough pat-down search for weapons and contraband, to remove the contents of the pockets, footwear and belts, to employ metal detector searches and canine searches, and to conduct strip searches "if, based on the less intrusive methods of search listed above, there is reason to believe that an individual detainee is concealing a weapon or contraband." (Appendix A, p. A-5 - A-6).

At the Sheriff's request, the permanent injunction was amended to permit detained individuals to shower in complete privacy to control lice, and when the west building population exceeded 45 detainees, to permit the Sheriff to strip search the excess and place them in the general jail population in the east building. (Petition App., p. A-25). Plaintiffs have never contended that a strip search preceding confinement in the east building is unconstitutional, and that practice was not affected by the injunctive relief granted by the District Court.

SUMMARY OF ARGUMENT

As a rule, an issue raised for the first time in a petition for certiorari will not be considered. Lubbock County's sole point on appeal involved the constitutionality of the strip search policy; its argument that its enforcement

hold arrestees on a temporary basis until they could make bond or otherwise secure release. (Appendix A, p. A-3). The strip searches occurred in the west building before bond was set and before the arrestees had an opportunity to make bond.

The east building, which contains the kitchen facility, library, exercise rooms, a laundry and infirmary, houses the general inmate population. Plaintiffs do not challenge the constitutionality of strip searches conducted when a detainee is unable to secure release and is transferred to the general population in the east building. (Appendix A, p. A-3).

should not have been enjoined was not timely raised, and thus it was waived.

The strip search policy was violative of Plaintiffs' Fourth Amendment rights. This Court may presume that Lubbock County will give full recognition to the holdings of the courts below, and the propriety of the injunction should be of no concern to this Court.

Lubbock County did not challenge the claim of Plaintiff Stewart's attorneys for attorney fees under 42 U.S.C. § 1988, although the County had adequate opportunity to do so. Having waived its right to an evidentiary hearing in District Court, Lubbock County has waived its right to challenge the attorney fee award on petition for certiorari.

ARGUMENT

1. Petitioners Did Not Preserve the Injunction Questions for Certiorari Review

Aside from the attorney fee issue, *infra*, the sole and only question presented to the court of appeals below was whether

> [t]he [District] Court erred in ruling, as a matter of law, that the strip search policy of the Lubbock County Sheriff's Department was unconstitutional.

(Lubbock County's Brief in the Court of Appeals, p. 2). The injunctions were never mentioned in the course of Lubbock County's argument (*id.*, p. 8-10), and the court below observed that since Lubbock County sought no relief from the permanent injunction, that issue was not

before the court on appeal. (Petitioners' App., p. A-5, n.3)

A claim not raised below must fail. *Town of Hallie v. City of Eau Claire*, — U.S. —, 105 S.Ct. 1713, 1718, n. 5, 85 L.Ed.2d 24, 31 n. 5 (1985). Likewise, failure to raise an issue in a timely manner precludes consideration by this Court, *Hoover v. Ronwin*, — U.S. —, 104 S.Ct. 1989, 1998, n. 25, 80 L.Ed.2d 590, 603, n. 25 (1984), *reh. denied*, — U.S. —, 104 S.Ct. 3564, 82 L.Ed.2d 865 (1984), and issues raised for the first time in the petition for certiorari should not be considered. *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

In obvious response to District Judge Hinojosa's dissent,[2] which argued that the issue of Plaintiffs' standing to seek injunctive relief should have been raised *sua sponte* (Petitioner's App., p. A-11-12), the majority noted that Lubbock County sought no relief from the permanent injunction, so it was not before the court. (Petition App. p. A-5, n.3). On Petition for Rehearing, Lubbock County cast its lot with Judge Hinojosa, abandoning the Fourth Amendment constitutional question and attempting to recast its case in terms of error in granting injunctive relief.

Lubbock County's change of position came too late. Reference in the decision to matters not before the court of appeals does not present the issue so it may be raised in the petition for certiorari. *Heckler v. Campbell*, 461 U.S. 458, 468 and n. 12 (1983). When the Petition for Rehearing was filed, the case had been decided. *San*

[2]Judge Hinojosa, of the Southern District of Texas, sat by designation. (Petition App., p. A-3).

Pedro and Cañon del Agua Company v. United States, 146 U.S. 120, 137 (1892). A petition for rehearing in the court of appeals presents no question for review in this Court, *id.*, and matters raised then for the first time will not be considered on petition for certiorari. *Hoover v. Ronwin*, *supra*.[3] Lubbock County failed to raise the issue of injunctive relief below, and it may not raise it now, for the first time, in its Petition for Certiorari. *Id.*; *United States v. Ortiz*, *supra*. The Petition for Certiorari should be denied.

2. Petitioners May Not Complain That Their Unconstitutional Strip Search Policy Was Improperly Enjoined

The Court of Appeals recognized the distinction, as Lubbock County does not, between an unreasonable strip search of a minor offender, detained only briefly while awaiting bond, and a reasonable strip search of pre-trial detainees who authorities have "reasonable suspicion" to believe have weapons or contraband concealed on the persons, or who are entering the general jail population after failing to make bond. (Petition App., p. A-7).[4] The lower court was persuaded by the Seventh Cir-

[3]The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Here, the lower court, summarily overruling the Petition for Rehearing, rejected Lubbock County's untimely attempt to raise the question of injunctive relief for the first time at that late date.

[4]The cases cited by Lubbock County are inapposite. Indeed, *Thorne v. Jones* 765 F.2d 1270 (5th cir. 1985), while sustaining strip searches of convicted prisoners, held that a strip search of prison visitors without reasonable suspicion violated the Fourth Amendment. *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983), is also a prison strip search case. The strip search in *United States v. Ruigomez*, 702 F.2d 61 (5th Cir. 1983), followed a valid arrest on a weapons charge, and there was probable cause , not just reasonable suspicion, to justify the strip search. The same is true in *United States v. Klein*, 522 F.2d 296 (1st Cir. 1975), and in both cases the issue was

cuit Court of Appeals' construction of *Bell v. Wolfish*, 441 U.S. 520 (1979) in *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983). That court construed the balancing test in *Wolfish*[5] to preclude, in circumstances very similar to those in Lubbock County's jail (Petition App., p. A-8), strip searches of "minor offenders who were not inherently dangerous and who were being detained only briefly while awaiting bond." *Mary Beth G. v. City of Chicago, supra*, at 1272.

In balancing the personal indignity of the strip searches[6] against the governmental interest in conducting them, the Seventh Circuit court applied a reasonableness standard requiring "at a minimum, that the facts upon which an intrusion is based be capable of mea-

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raised by motion to suppress evidence rather than in a 42 U.S.C. § 1983 action. No strip search was involved in *United States v. Sandler*, 644 F.2d 1163 (5th Cir. 1981), where the only issue was "whether a 'pat-down' or other less intrusive border search must, like a strip search, rest on reasonable suspicion." *Id.*, at 1167.

[5]"The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish, supra*, at 559.

[6]A strip search involving only a visual inspection of the anal and genital areas has been described as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago, supra, quoting from Tinetti v. Wittke*, 479 F.Supp. 486, 491 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980).

In contrast to the invasive nature of the strip search here, the inmate in *Wolfish* was not touched at any time during the visual search procedure, 441 U.S., at 558, n. 39. In *Thorne*, "the naked body of the subject is very thoroughly inspected, but not touched, by prison personnel of the same sex." 765 F.2d, at 1271, n. 1. The detainees in *Mary Beth G.* were not even entirely undressed. 723 F.2d, at 1267. There is no indication in *Ruigomez*, despite the search of the defendant's clothing after removal, that the strip search was more than visual.

surement against 'an objective standard,' whether this be probable cause or a less stringent test." *Id.*, at 1273; *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). The court concluded that the strip searches of minor offenders awaiting release on bond was unreasonable.

The Court must bear in mind that Lubbock County's jailers may still pat-down any detainee and utilize metal detectors and canines (Appendix A, p. A-5), and they may conduct a strip search for weapons or contraband if these less intrusive methods show that reasonable suspicion exists. Likewise, jailers are still permitted to strip search any prisoner entering the general jail population in the east building. *Id.*, p. A-6. All that is enjoined is a blanket strip search, prior to arraignment and an opportunity to make bond, of all detainees, including minor offenders, when no reasonable suspicion exists that they might possess weapons or contraband. (Petition App., p. A-7).

Both the District Court and the Court of Appeals, applying *Wolfish's* balancing test, found Lubbock County's strip search policy unreasonable and in violation of the Fourth Amendment as applied to these Plaintiffs. Those decisions being unchallenged here, this Court may assume that Lubbock County will give full recognition to them. The only issue presented, that of injunctive relief, should thus be of no moment to this Court. *Cf. Doe v. Bolton*, 410 U.S. 179, 201 (1973), where this Court, on the same assumption, declined to decide whether the denial of injunctive relief was proper after holding unconstitutional the policies sought to be enjoined. The Petition for Certiorari should be denied.

3. Petitioners Did Not Preserve the Award of Attorney Fees for Certiorari Review

This Court has already addressed and decided adversely to Lubbock County its contention that the District Court abused its discretion in refusing to set aside the default judgment for attorney fees in Stewart's case.[7] In *Blum v. Stenson*, 465 U.S. 886 (1984), cited by both courts below (but not mentioned by Lubbock County in its Petition), this Court said that the defendant's failure to submit any evidence challenging the accuracy and reasonableness of plaintiff's counsel claim for 42 U.S.C. § 1988 attorney fees, constituted a waiver of his right to an evidentiary hearing in District Court.[8] Having waived that right, the defendant (as petitioner in this Court) waived his right to challenge the District Court's award. *Id.*, at 892, n. 5.

Blum v. Stenson is controlling. Lubbock County, by its failure to respond, waived its right to an evidentiary hearing in District Court, and thus it waived its right to challenge the District Court's award here. *Hensley v.*

[7]Lubbock County makes no claim that it was without notice of Plaintiff Stewart's application for attorney fees. Under Local Rule 5.1 (e), Lubbock County had 20 days from the date of filing to respond. In this case, as is the practice in the Lubbock Division of the Northern District of Texas, the District Court ordered the County to respond within 20 days of the date of the order (Petition App., p. A-9, 27), which actually served to give the County an additional three days to respond. Whether it did so intentionally or by design, Lubbock County admits it failed to file a response. (Petition, p. 11).

[8]The County also implies that since Stewart was awarded only nominal damages, she is not the prevailing party within the meaning of § 1988. (Petition, p. 12). That contention also has been decided adversely to the County. Plaintiffs may be considered "prevailing parties" for attorney fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The District Court held (and the Court of Appeals affirmed), on the most significant issue in litigation, that the strip search violated Stewart's Fourth Amendment rights.

Eckerhart, 461 U.S. 424 (1983), upon which the County relies, does not come into play. *Blum v. Stenson*, *supra*, n. 5. Lubbock County's argument is frivolous, and its Petition for Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel for Respondents

February, 1986

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 1986, three copies of Respondents' Brief in Opposition were mailed, postage prepaid, to Cecil Kuhne, Esq., P.O. Box 1499, Lubbock, Texas 79408, Counsel for the Petitioners. I further certify that all parties required to be served have been served.

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. CA-5-83-26

BARBARA WILKERSON, on behalf of herself and all others similarly situated, Plaintiffs,

v.

LUBBOCK COUNTY, TEXAS; and DELWIN LEE (SONNY) KEESEE, Individually and in his capacity as Sheriff of Lubbock County, Texas; LANNY RICE, JOHN GROSS, TAMMY DOE and JAMES DOE, Lubbock County Sheriff's Deputies, Individually and in their official capacities, Defendants.

TEMPORARY INJUNCTION

Plaintiffs, by their complaint, have sought a temporary restraining order, a temporary injunction, and a permanent injunction requiring the Sheriff of Lubbock County, Texas and his deputies to comply with constitutional standards in conducting "strip searches" in the Lubbock County Jail.

Hearings on the temporary restraining order were held on the 8th and 10th days of March, 1983, and a temporary restraining order was issued and is attached hereto as Appendix I. After due notice, all parties and attorneys appeared before the court on the 21st day of

March, 1983, and the court heard the evidence and argument of counsel for a temporary injunction.

After hearing and considering the pleadings, the briefs of the parties, as well as the evidence and oral argument from the parties and attorneys in this case, the court finds and concludes as follows:

I

A strip search of an individual arrestee by law enforcement officers, including the Sheriff of Lubbock County and the deputies, is an invasion of a person's right to privacy.

II

That invasion of a right to privacy by persons acting under color of law, such as the sheriff and his deputies, is a deprivation of a constitutional right giving rise to a cause of action pursuant to 42 U.S.C. § 1983.

III

However, not every strip search of an individual arrestee constitutes a deprivation of that person's constitutional rights. A strip search may be authorized in order to prevent the introduction of contraband, weapons, or disease into the general jail population. This right to strip search for these purposes is for the protection of the prisoner himself and other prisoners who might be harmed or injured by the introduction of contraband, weapons, or disease, and is also for the protection of the public at large by preventing escapes and providing for proper jail security.

IV

In this case, it appears that the Lubbock County Jail consists of two buildings which are separated by a "sally port." The western-most building houses the booking rooms, property rooms, two dressing rooms, for male and female, and seventeen holding cells, six of which are single-cell units, two of which are for violent prisoners and two of which are used for detoxification purposes. The remaining seven cells can accommodate as many as fifty-six prisoners. The architect for the county who designed and supervised the construction of this jail testified that these holding cells were designed to hold arrestees on a temporary basis until they could make a bond or secure their release otherwise.

The eastern portion of the jail consists of a kitchen facility, library, exercise rooms, a laundry, infirmary, and cells to imprison arrestees who are unable to make bond. Trusties who have access to both buildings are strip-searched when they reenter the general jail population area if they have come in contact with arrestees who have not been strip-searched.

V

It is the purpose of this order to precisely set forth standards for conducting strip-searches individual arrestees, and the court is of the opinion that the following order will meet constitutional standards:

Therefore, the Sheriff of Lubbock County, Texas, his deputies, agents, and employees, and all other defendants herein are hereby temporarily enjoined from strip-searching any individual arrestee unless the following

procedures are used. This injunction shall remain in force from the date and time hereof until this case has been determined and decided by a final judgment.

The procedures to be followed are:

A. The defendants in this case, their agents, servants, and employees, are permitted to strip-search any individual arrestee when that individual is placed in the eastern-most building of the jail where the general jail population is held and incarcerated. In order to make certain that there is no denial of equal protection of the laws, each such individual arrestee shall be subject to such strip-search immediately prior to being placed in the general jail population.

B. The defendants herein are enjoined and prohibited from placing any individual arrestee in the eastern-most building of the jail and in the general jail population unless the following procedures are complied with:

1. The individual arrestee must be taken before a justice of the peace or other judicial officer of the State of Texas for the purpose of having a bond set that would entitle the arrestee to release upon the proper execution and presentment of said bond.

2. Further, such arrestee shall not be confined in custody in the eastern-most portion of the general jail population until after such individual has been given the opportunity to make a bond. If an individual arrestee fails to make bond by 3:00 P.M. of the day following his appearance before a judicial officer (or the following Monday if the arrest occurs after Saturday noon or on Sunday), such person may be placed in the general jail

population in the eastern building and may be strip-searched before transfer to the general jail population. This will afford the individual an opportunity to make the required bond.

C. Nothing herein shall prevent the defendants from releasing a prisoner at an earlier period than that provided for above, if a proper bond is made or if in the discretion of the sheriff or his deputies release would be proper under the circumstances.

In this connection, the court finds that the handling of the individual arrestees under the temporary restraining order concerning misdemeanors where the punishment is by fine only and ordinary traffic violations is proper, but if there is a conflict between the manner of handling these cases at present and this order, this order shall prevail.

D. The above injunction will not prohibit the sheriff or his deputies, and the other defendants herein from:

(1) Conducting a thorough pat-down search of the arrestee for weapons and contraband upon his entering the pre-booking area;

(2) Removing from the possession of the arrestee the contents of his pockets and his footwear and belt;

(3) Employing metal detector searches in the pre-booking area, within the security trap, or within the holding area;

(4) Employing canines trained to detect concealed narcotics; and

(5) Conducting strip searches if, based on the less intrusive methods of search listed above, there is reason to believe that an individual detainee is concealing a weapon or contraband.

E. In the event that the above procedures require the sheriff and his deputies to hold individual arrestees in the west building of the jail for the above required periods of time, and as a result thereof the number of persons being held in the west building exceeds sixty-five at any one time, the sheriff may, in order to avoid overcrowding, strip search a sufficient number of individual arrestees and place them in the eastern-most building with the general jail population. The individuals to be strip-searched under these conditions shall commence with the one who has been in confinement for the longest period of time. The maximum of sixty-five arrestees to be held in the western wing shall include any prisoners in the detoxification cells, the individual arrestees in the holding area, and the violent or uncontrollable prisoners who might be held in two of the holding cells in the area, plus those who are held in the administrative or "pre-booking" area prior to transfer to any of the holding cells, and including those in the holding cells.

F. It is the finding of this court that the above order will provide proper security and will not entail a material additional expense as deputies will be relieved in many instances of conducting strip searches. It is not the intention of this order to provide detail by detail the manner that the sheriff and his deputies should maintain control and security over the jail, but only to provide a maximum guideline which would prohibit or permit strip searches of individual arrestees prior to the time that they are

mixed with the general jail population in the eastern-most part of the jail.

This order is entered upon the court's determination that irreparable harm and injury will result to individuals if the order were not entered and there is no adequate remedy at law to redress such injury.

It is so ordered.

The trial of the case on its merits will be scheduled in its regular place on the docket.

The United States Marshal will furnish a copy hereof to the attorney for each party and to the Sheriff of Lubbock County, Texas.

ENTERED this 22nd day of March, 1983 at 1:45 o'clock P.M.

/s/HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX B

SHERIFF'S OFFICE
LUBBOCK COUNTY
LUBBOCK, TEXAS

STRIP SEARCH

217.09.016, T.C.J.S., *STRIP SEARCH*. Inmates should have a thorough strip search which should include a check for body vermin, cuts, bruises, needle scars, and other injuries. Only females shall conduct such a search of females. Only males shall conduct such a search of male inmates.

217.09.012, T.C.J.S., *SEARCH*. All inmates upon admission shall be thoroughly searched for weapons and any contraband.

All prisoners (male and female regardless of charges) entering the Lubbock County Jail for processing will be strip searched prior to booking procedures. To eliminate introduction of weapons and all contraband from entering into this facility the following procedure will be taken:

Immediately after clearing security 2 and 3 all inmates will be taken to respective dressing rooms (male or female). A strip search will be made by having the prisoner remove all clothing. The prisoner's clothing, exterior body, and to a limited extent body orifices are then carefully examined. Because the prisoner is required to be naked, this search should occur in a setting which will not unduly embarrass the prisoner or others. In order to be thorough, safe, and insure a minimum of embarrass-

ment, the following procedure for strip searches of male prisoners is provided.

1. Instruct the prisoner to remove clothing, place clothing on the floor, and move out of reach of the clothing.
2. Instruct the prisoner to stand erect, feet apart, with arms extended outward.
3. Run fingers through prisoners hair.
4. Shine light into ears, and look for contraband in and behind the prisoner's ears.
5. Shine light into nose and look for contraband.
6. Look for contraband in mouth. Have prisoner raise and lower tongue and pull lips away from gums to allow your inspection of area between mouth and gums.
7. Instruct prisoner to remove any artificial devices (such as false teeth and artificial limbs) and examine for hollowed-out parts.
8. Run both hands down from shoulder and armpit to wrist to look for contraband.
9. Run hand through armpit for contraband.
10. Spread prisoners fingers, turn hands over and look for contraband on hands and fingers.
11. Instruct prisoner to spread legs and run hand into groin area to search for contraband.
12. Instruct prisoner to raise each foot and spread toes; inspect for contraband on the soles of feet by running hand over soles to check for things hidden in skin.
13. Look for contraband between toes of feet and run fingers between each toe.
14. Instruct prisoner to bend over and spread buttocks; using a flashlight inspect for contraband in rectum.
15. Remove any bandages and look at injured area; crush

and discard bandage and replace if necessary (with medical assistance if needed).

16. Instruct the inmate to stand erect, feet apart, hands on top of head.
17. Move out of prisoner's reach to inspect clothing.
18. Crush collar, pockets, cuffs, linings, and seams of shirt.
19. Crush waistband, belt loops, fly, cuffs, and seams of pants.
20. Crush socks.
21. Pull on heel and sole of shoes to detect compartments for presence of contraband.
22. Run hand inside of shoes, determine if sole lining could conceal contraband or evidence.
23. Inspect belt for contraband by rolling it up.
24. Tug on belt buckle.
25. Inspect the belt seams by twisting belt to see if it separates.
26. Inspect hat for contraband by running hand around crown.
27. Inspect sweat band for contraband by pulling it away from the crown and looking at space between band and crown.
28. Inspect lining of hat for contraband by pulling it away from the crown and looking at space between lining and crown.
29. Inspect tie for contraband by pulling and crushing.
30. Check all other possessions of the inmate such as packages, letters, and books; open package and inspect by removing contents.
31. Open envelopes, remove and inspect contents.
32. Fan book pages upside down.

33. Instruct inmate to shower or dress as your department's policy indicates.

The same procedures as above applies to female prisoners conducted by female officers.

No probing of body cavities by jail personnel. This will be done by certified physicians or hospital.